Supreme Court, U.S.
FILED
DEC 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-838

In The
Supreme Court of the United States
October Term, 1986

HAROLD NORDLICHT, on behalf of himself and all others similarly situated,

Petitioner,

against

NEW YORK TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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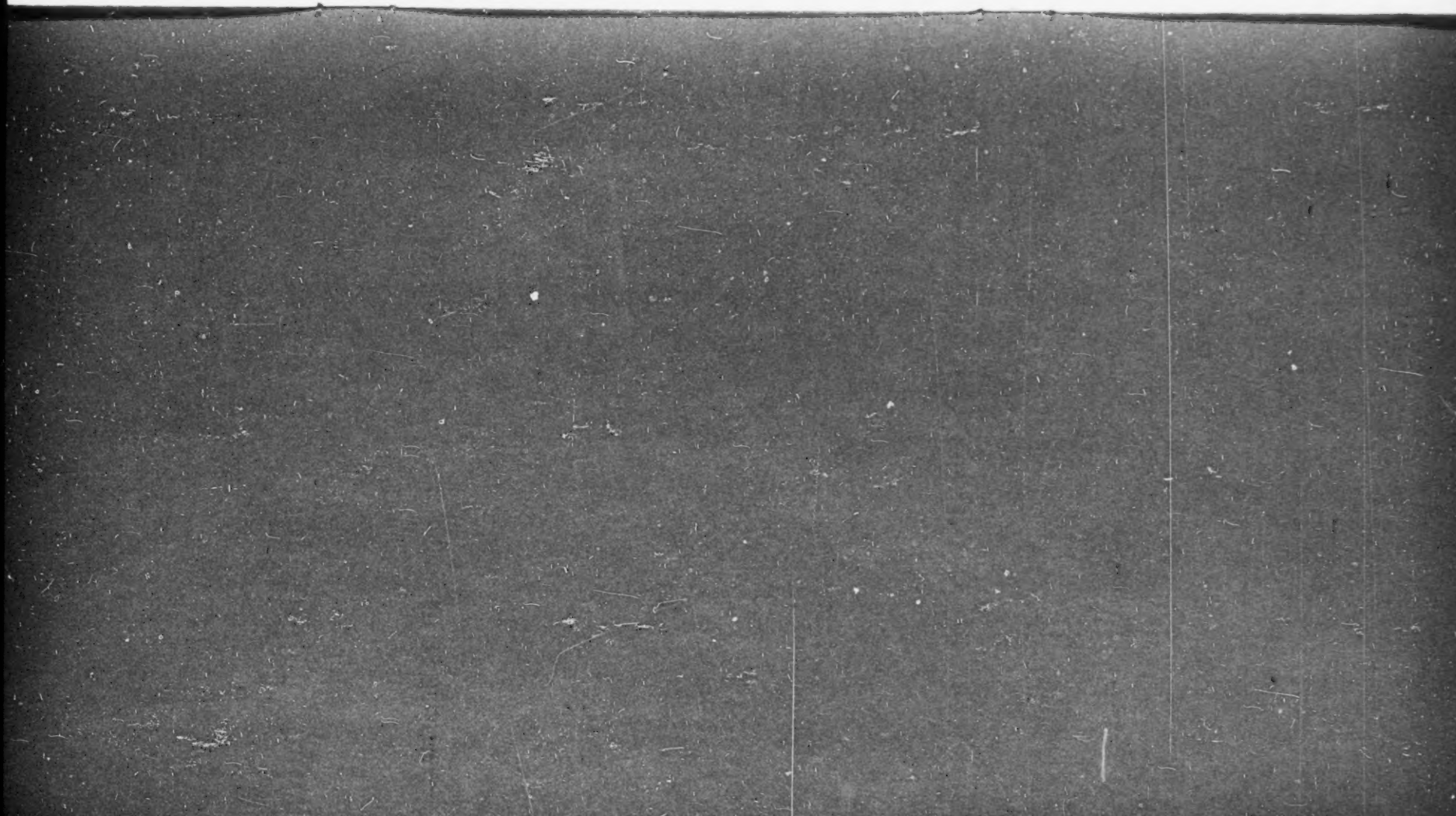

Designation of Affiliated Corporations

Pursuant to Rule 28.1 of this Court, respondent submits this designation of corporate relationships.

1. Respondent New York Telephone Company is a wholly-owned subsidiary of NYNEX Corporation, a Delaware corporation.

2. Empire City Subway Company is a subsidiary of respondent New York Telephone Company.

3. NYNEX Corporation owns or has an interest in New England Telephone Company, NYNEX Development Company, NYNEX Business Information Systems Company, NYNEX Mobile Communications Company, NYNEX Information Resources Company, NYNEX Credit Company, NYNEX Material Enterprises Company, NYNEX Service Company, NYNEX Properties Company, NYNEX Government Affairs Company and NYNEX Communications Research, Inc.

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The decisions of the District Court and the Court of Appeals are reported at 617 F.Supp. 220 (S.D.N.Y. 1985) *aff'd*, 799 F.2d 859 (2d Cir. 1986).

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BRIEF IN OPPOSITION

Respondent New York Telephone Company (New York Telephone) opposes, and files this brief in opposition to the petition by Harold Nordlicht (Nordlicht) for the issuance of a writ of certiorari to review the decision and judgment of the Court of Appeals for the Second Circuit, dated August 25, 1986.

Statement

This case concerns the reasonableness of telephone charges made by respondent New York Telephone for telephone calls originating outside the United States and billed to petitioner Nordlicht's home telephone number in New York State. Nordlicht is an attorney who alleges that, while in Canada, he made telephone calls on his New York Telephone credit card between various points in Canada (Canada-Canada calls) and between Canada and the United States (Canada-United States calls). He claims that he was quoted a price for his calls by a Canadian telephone company in Canadian currency. New York Telephone, in turn, assertedly billed him in American currency, not making an adjustment for the existing difference in value between Canadian and United States dollars.

Nordlicht originally commenced his lawsuit in the Supreme Court of the State of New York, suing both individually and on behalf of the members of a purported class consisting of customers of New York Telephone who, during the relevant period, made Canada-United States or Canada-Canada calls and who allegedly charged those calls to their telephones within New York State.[1] The complaint sought damages based on common law theories of fraud ("Count I") and money had and received ("Count II"). Respondent removed the action to the

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[1] The events set forth in the complaint antedate the divestiture of the Bell System on January 1, 1984. Prior to that date, New York Telephone was a wholly-owned subsidiary of the American Telephone and Telegraph Company (AT&T). Today respondent is a wholly-owned subsidiary of NYNEX Corporation.

United States District Court for the Southern District of New York. Following removal, respondent moved to dismiss the complaint or, alternatively, to stay the action and refer it to the Federal Communications Commission (FCC). Nordlicht cross-moved for an order remanding the case to the New York State courts. Alternatively, Nordlicht requested summary judgment.

The District Court denied Nordlicht's motion to remand. On the merits, the District Court granted New York Telephone's motion to dismiss on Nordlicht's claim for money had and received in connection with international (Canada-United States) telephone calls.[2] The Court dismissed without prejudice the remainder of Nordlicht's claims and granted leave to replead within 20 days. Since Nordlicht failed to file an amended complaint within the 20-day period, all of Nordlicht's claims were then dismissed with prejudice.

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[2] The FCC tariff setting forth the specific rates to be applied to international calls provides:

> "In connection with service from points outside the United States, including ships, vessels or aircraft, to points within the United States, when the charges to customers are made by telephone companies in the United States, rates as specified herein plus additional charges of foreign administrations, if any, in United States dollars, apply to all calls." Tariff FCC No. 263, Section 2.4.6.

Hence, when an American telephone company including New York Telephone, charges one of its customers for calls made to the United States from points outside the United States, the rates and practices specified in FCC Tariff No. 263 apply. Such rates are, in accordance with the express language of the tariff, applied in United States dollars. The tariff regulation by its terms applies to telephone calls from any foreign country.

On appeal, the Second Circuit affirmed the dismissal of Nordlicht's claims.[3] Before doing so, however, it affirmed the denial of Nordlicht's motion to remand, holding that—due to the comprehensive nature of Congress' regulation of telephone carriers—federal law had preempted Nordlicht's state law claims and had supplanted them with federal common law; and that the general federal question statute, 28 U.S.C. § 1331, provided a proper basis for federal jurisdiction.

———o———

Summary of Argument

The Court of Appeals' opinion is in conformity with the decisions of this Court and the other Circuit Courts that have addressed the same issues and does not raise any point meriting review by this Court.

———o———

ARGUMENT

I

Removal Was Proper

The thrust of Nordlicht's petition is that a conflict allegedly exists between the Circuits and particularly between the Ninth Circuit's decision in *Hunter v. United Van Lines*, 746 F.2d 486 (9th Cir. 1984) and the reason-

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[3] By his petition in this Court, Nordlicht—unhappy with the decision on the merits in the federal court system—seeks the opportunity for a different result in the state courts by challenging the removal of his case to the District Court.

ing of the Second Circuit set forth in *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968). The *Nordlicht* panel relied heavily on the *Ivy* case in affirming the denial of Nordlicht's motion to remand. Nordlicht is wrong in asserting that there is a conflict between the Ninth and Second Circuits on the issue of the application of the doctrine of federal preemption to removal motions when no such conflict in fact exists.

Relying on *Ivy*, the *Nordlicht* panel held that the considerations expressed in *Ivy* made it appropriate to fashion a uniform body of federal common law for resolution of claims against domestic telecommunications carriers with respect to their billing practices for calls made within a foreign country. In response to Nordlicht's contention that such a conclusion would violate the principle that a plaintiff is the "master of his complaint," the Second Circuit observed that Nordlicht had failed to reckon with the "artful pleading" doctrine in that a state law claim may properly be recharacterized as a federal claim when (a) the state law claim is preempted by federal law and (b) the only remedy available to the plaintiff is federal, *e.g.*, the state court must necessarily look to federal law in passing on the plaintiff's claim.

The approach followed in *Nordlicht* and *Ivy* is the same in the Ninth Circuit. In the *Hunter* case, for example, the Ninth Circuit likewise held that recharacterization of a complaint under the artful pleading doctrine is proper when (a) a state law claim is preempted by federal law, *and* (b) federal law provides plaintiff a remedy for the wrong allegedly sustained. *Hunter*, *supra*, at 643. Removal is only improper, the Ninth Circuit held, when federal law displaces state law but fails to replace the

state cause of action with a federal one. In other words, federal jurisdiction is lacking, the *Hunter* court said, if federal law does not provide an alternative cause of action in favor of the plaintiff to enforce his rights, as, for instance, when federal preemption acts solely *as a defense* to the state law claims. *Id.* at 643, citing with approval this Court's opinion in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

That is clearly not the case here. New York Telephone's preemption argument is not—as Nordlicht mistakenly appears to contend—solely defensive. On the contrary, Nordlicht's state law claims have been correctly recharacterized by the Court of Appeals as claims—not defenses—arising under federal common law (6a, 7a). Nordlicht's claims involve the reasonableness of charges for the provision of telecommunications services. The wrongs Nordlicht complains of relate directly to the principles and objectives set forth in the Communications Act which Congress has established for the governance of "all interstate and foreign communications by wire or radio." 47 U.S.C. § 152. His complaint, whether characterized as "overbilling," "fraud" or "money had and received," plainly implicates the validity of rates and practices included in tariffs filed with the FCC. Compliance with both state and federal law under the circumstances of this case is an impossibility and can only lead to piecemeal and possibly contradictory results in an area where considerations of uniformity of regulation are a matter of paramount interest and concern. The Court of Appeals therefore held that Nordlicht has a remedy under federal common law and that Section 1331 provides an appropriate jurisdictional basis for his suit. As Chief Judge Lumbard, speaking for the panel in the *Ivy* case, said:

> "We believe that a cause of action similarly 'arises under' federal law if the dispositive issues stated in the complaint require the application of federal common law. . . . The word 'laws' in 1331 should be construed to include laws created by federal judicial decisions as well as by congressional legislation. The rationale of the 1875 grant of federal question jurisdiction—to ensure the availability of a forum designed to minimize the danger of hostility toward, and especially suited to the vindication of, federally created rights—is as applicable to judicially created rights as to rights created by statute."

This Court concurred in the latter conclusion in *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972), specifically quoting the above language with approval.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Dated: New York, New York
November 17, 1986

Respectfully submitted,

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